

**FILED**

2011 AUG - 3 DB

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

U.S. DISTRICT COURT  
MIDDLE DISTRICT OF TN.

RASHONDA MOORE

PLAINTIFF,

V.

USHER RAYMOND, IV, LAFACE RECORDS,

ZOMBA LABEL GROUP, BRYAN MICHAEL

COX, SO SO DEF RECORDINGS,

DEFENDANTS.

CASE NUMBER: 309CV0891

JUDGE TRAUGER

MAGISTRATE JUDGE BRYANT

DECLARATION OF MICHAEL KUREK

I, Michael Kurek, declare:

1. My name is (Vanderbilt) Professor Michael Kurek, D.M.A. . I am a musicologist. I am over the age of twenty-one and competent to testify to the matter of music as it relates to this case. I give this declaration in support of the Plaintiff.
2. I have examined the original song "Everlasting Love" by Rashonda Moore and compared it with the songs "Burn," "How to Deal," and "Got Me Waiting," which Ms. Moore believes were a copyright infringement upon her song "Everlasting Love." The purpose of my report was to determine what, if any, technical elements these songs might have in common.
3. Attached as Exhibit 1 to my declaration is a true and correct copy of my written report concerning the songs, "Everlasting Love" and "Burn."
4. Attached as Exhibit 2 to my declaration is a true and correct copy of the comparison of musical notes for the songs, "Everlasting Love" and "Burn. "
5. Please note that when I was originally given these songs to compare, I was not told anything about the songs or the artists or the circumstances. So I am not speaking here to issues such as access or intent, or relationships between these artists (of which I have no knowledge). My report only indicates what is in the music itself: It shows that I did find the songs had remarkable technical similarities, in and of themselves. I do go on to say that in my professional opinion, there are too many similarities between the songs for all of them to have simultaneously, accidentally happened. So it is my conclusion that the only way so many similarities could be present would be through some kind of derivative process.

I declare under penalty of perjury under the laws of the United States that the information provided is true and correct, executed on this 2<sup>nd</sup> day of August 2011.

Signature

*Michael H. Kurek*

August 2, 2011

To Whom It May Concern:

The following report concerns my comparison of the song "Everlasting Love" by Rashonda Moore with "Burn" (Usher), "How to Deal" (Frankie J.), and "Got Me Waiting" (Fantasia). I was not previously familiar with any of these songs and have no prior or present relationship with any of the artists.

The similar elements that appear to me worthy of comment are the key, the tempo, the chords, the melody (including its rhythm), and the way these are used in the instruments and the arrangement. I wrote out a lead sheet (musical score) of a portion of each track so that they were in the same key and with the similar melodies lined up vertically, so I could visually compare them.

All the songs varied only slightly in key, some being pitched a step above or below each other. I can imagine that if they were all drawn from the same source, a particular singer might have asked for the accompaniment to be played slightly higher or lower when recording. Normally, if you took four completely unrelated songs and looked at the keys, chances are good that the keys would vary much more widely and not all lie within a step or two.

Likewise, all the songs have almost exactly the same tempo, and considering other similarities below, this tends to support the idea that they are all related. If you could find four songs that did accidentally have the similarities mentioned below, chance seem small that they would also have the same tempo and feel as well.

The chords used are the same (when played in the same key), being the chords built on the first, fourth, fifth notes of the scale (called I, IV, and V), but largely focusing on "I" and "IV" with only a brief "V". However, this is of little importance taken alone, because these are the most common chords used in many songs. But at least the chords do not supply any evidence to deny a similarity.

The important similarity is that the melody sung by the singer in track one appears almost exactly in each of the other tracks. However, in each of them the similar melody is not in the voice but in the guitar. Its first appearance is in the main four-bar acoustic guitar accompaniment, after each song's short introduction. (After that, it varies further.) This four-bar "riff" or "groove" pattern is not perfectly the same in each of the songs, but the main accent points do line up, making the four tracks sound to any reasonable ear like slightly varied versions of the same thing.

The way that this melody is used weighs heavily in making the pieces sound intentionally related, because it is consistently played by the acoustic guitar in the same register, as a foundation for a singer to improvise a vocal part more freely over it. While this kind of improvising over a repeated groove is very common in the style, it seems remarkable that they all use the acoustic guitar in the same way, given the other similarities.

Without knowing anything about the circumstances at the time, I speculated with an educated guess that what might have happened was that someone perhaps submitted track one (turned out to be Ms. Moore) as a demo to a producer, who liked the vocal melody and proceeded to use it as a guitar groove for several different artists he was producing. I only recently learned that this is indeed what is alleged.

It might be possible to argue that a repeated pattern used as a melodic "riff" is too generic to treat as intellectual property. However, I would not personally consider this melodic idea at all generic. It is too clearly "composed" and not like a short blues pattern as generic riffs usually are. Because of its distinctive rhythmic syncopation as used here it might be very hard to produce any other examples that sound this similar. If there were four songs in the world that accidentally had this same melodic riff, chances seem too narrow that they would also accidentally have the same instrument playing them in the same register at the same tempo and all within a step or two of the same key!

In my opinion this little melodic phrase's identity in this arrangement and musical context is very distinctive and not just a generic pattern one might hear randomly, having more of the nature of a "hook" itself than merely an accompaniment pattern. And in this style, as in rap-related styles that lack a real vocally sung hook, memorable melodic patterns in the instruments do take on more importance to the unique identity of the song than accompaniments do in other styles where someone is singing a memorable tune. Arguably it is the accompaniment riffs that account as much now for the essential, unique identity of many rap-related songs, whereas in a previous era a song's essential identity was almost always found in what the lead singer was doing. In my opinion, then, the songs "Burn" (Usher), "How to Deal" (Frankie J.), and "Got Me Waiting" (Fantasia) all appear owe their most characteristic musical sound and identity to Ms. Moore's "Everlasting Love," (assuming the latter was composed first). In my opinion, the chances that all these similarities and this degree of musical similarity between them happening by accident or coincidence are not really possible.

Sincerely,

*Michael H. Kurek*

Professor Michael Kurek, D.M.A.  
Department of Composition/ Theory  
Blair School of Music at Vanderbilt University

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# Moore/Usher

Analysis by Michael Kurek

♩ = 116

MOORE

Life has nev - er been the same since love came and found me.

USHER

Chords

*p* B Maj. (I) E Maj. (IV)

5

MOORE

I was so lost and in pain when love came and freed me.

USHER

Chords

B Maj. (I) (add Maj 7 in Usher) E Maj. (IV)

Y = This same pitch is also in the Usher piece

N = This is an ornamental tone not found in the Usher

(Y) = This is a related note from the same chord, at the same point in the rhythm

(R) = This is an ornamental tone not found in the Usher, but articulates the same point in the rhythm

Of 28 notes in the Roshonda Moore, 18 are Y, (Y) or (R). However, discounting the notes in the *extra* pattern at the end of each line in the Moore, 18 out of 20 notes are Y, (Y), or (R), confirming what the ear clearly hears as two versions of the same idea, each ornamented in a slightly different way, over the same chords.

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served upon

Timothy Warnock of Riley, Warnock & Jacobson, PLC  
1906 West End Avenue  
Nashville, TN 37203

by U.S. mail, this 3<sup>rd</sup> day of August 2011.

A handwritten signature in cursive script, appearing to read "R. D. Moore", is written over a horizontal line.